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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 494

BROTHERHOOD OF RAILROAD TRAINMEN AND
A. W. DAVIS,
Petitioners,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Respondent.

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Come now the Petitioners, Brotherhood of Railroad Trainmen and A. W. Davis under and by authority of Rule 58 (2) of the Rules of the Supreme Court of the United States and petition this court for rehearing of the order entered on December 7, 1964 denying a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the above styled case on the ground that circumstances have intervened which are of substantial and controlling effect.

STATEMENT OF GROUND IN SUPPORT OF PETITION

The United States Court of Appeals for the Fifth Circuit, determining that the decision of this court in *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville Railroad Company*, 373 U.S. 33, 83 S. Ct. 1059, 10 L. Ed. 2d 172 (1963), was not controlling, held, in the instant case, that non-money awards of the National Railroad Adjustment Board were reviewable on the merits by trial de novo despite Section 3, First (m) of the Railway Labor Act providing that such awards are "final and binding" on both parties to the dispute. 45 U.S.C.A., § 153 (m). On petition for writ of certiorari petitioners took the position that this decision of the United States Court of Appeals for the Fifth Circuit involved an important question under the Railway Labor Act which had not, but should be, settled by this Court and that said decision conflicted with the principles of applicable decisions of this Court, particularly, *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville Railroad Company*, *supra*.

After the printing for immediate filing of the petition for certiorari, the opinion of the United States Court of Appeals for the Sixth Circuit in the case of *Russ* v. *Southern Railway Company* was published in the Federal Reporter Advance Sheets. *Russ* v. *Southern Railway Company*, 334 F.2d 224 (C.A. 6th 1964). Contrary to the Court of Appeals for the Fifth Circuit in the instant case, the Court of Appeals for the Sixth Circuit in the *Russ Case* interpreted the decision of this court in *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville Railroad Company*, *supra*, as holding that non-money awards of the National Railroad Adjustment Board are final and binding on both

parties to the dispute and that only money awards are reviewable on their merits. The result is that a substantial conflict in the interpretation of this court's decision in *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville Railroad Company, supra,* has intervened and now exists between the United States Court of Appeals for the Fifth Circuit and the United States Court of Appeals for the Sixth Circuit, *Brotherhood of Railroad Trainmen* v. *Louisville and Nashville Railroad Company*, 334 F.2d 79 (C.A. 5th 1964); *Russ* v. *Southern Railway Company*, 334 F.2d 224 (C.A. 6th 1964).

As borne out by the *Russ Case, supra,* the logical interpretation of this court's decision in *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville Railroad Company, supra,* is that non-money awards of the National Railroad Adjustment Board are "final and binding" under Section 3, First (m) of the Railway Labor Act and, therefore, not subject to review on the merits by trial de novo. Such an interpretation is further justified in light of *Union Pacific Railroad Company* v. *Price*, 360 U.S. 601, 79 S. Ct. 1351, 3 L. Ed. 2d 1460 (1959), where this Court refused to allow an employee who had received an adverse determination of his claim before the Board to relitigate the merits of his discharge in the courts. The reason for such a result was that the denial of the claim by the Board constituted a non-money award made final and binding by Section 3, First (m), 45 U.S.C.A., § 153 (m). This court recognized in that decision that when the Railway Labor Act was enacted the "employees were willing to give up their remedies outside of the statute provided a *workable and binding statutory scheme was established to settle grievances*" [emphasis added] p. 613.

The result of the decision of the Fifth Circuit in the instant case and the refusal of this court to review the

same is that the employee, except where state law does not require exhaustion of administrative remedies, must submit his grievance to the National Railroad Adjustment Board. *Pennsylvania Railroad Company* v. *Day*, 360 U.S. 548, 79 S. Ct. 1322, 3 L. ed. 2d 1422 (1959); *Transcontinental & Western Air* v. *Koppal*, 345 U.S. 653, 73 S. Ct. 906, 97 L. ed. 1325 (1953). After long delay, in this case more than two years,[1] the board will decide the dispute. If the decision is adverse, the employee is prevented by the final and binding provisions of Section 3 First (m) from further review of a non-money award. Now the Fifth Circuit has held that even if a non-money award is rendered favorable to the employee he must relitigate the matter in its entirety in the courts despite the provision of Section 3 First (m) that such an award is final and binding on "*both*" parties to the dispute. Thus the "workable and binding statutory scheme" for which the employee has traded his remedy outside the Railway Labor Act is nothing more than a device by which the carrier may delay as much as four years[2] the ultimate decision on his grievance. An adverse determination by Board means economic death for the employee and now even an order of reinstatement is but an empty gesture creating a hope which may later be frustrated by courts and juries unfamiliar with the intricacies of labor disputes within the Railway industry. Congress did not intend that the employee receive so harsh a bargain nor such discriminatory treatment when he relinquished his outside remedies and so provided in Section

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1. Petitioner Davis was discharged on January 9, 1959, and was ordered reinstated by the National Railroad Adjustment Board on February 17, 1961. The merits of the award of reinstatement were retried in the Federal District Court and judgment was entered on March 29, 1963.

2. See footnote 1.

3, First (m) that "awards shall be final and binding on both parties to the dispute, except insofar as they shall contain a money award." 45 U.S.C.A., § 153 (m).

This court now has the opportunity to decide a question not heretofore determined which is vital to the effectiveness of the National Railroad Adjustment Board in the disposition of grievances within the railroad industry. From the decision of the Fifth Circuit in the instant case and the decision of the Sixth Circuit in the *Russ Case*, it is apparent that confusion and conflict exists among the circuits as to how this Court's decision in *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville Railroad Company, supra*, applies to the question presented. It is respectfully submitted that the court should dissolve this conflict by granting the Petition for Writ of Certiorari in the instant case.

Respectfully submitted,

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AL G. RIVES,
Attorney for Petitioners.

CLARENCE M. SMALL, JR., AND
RIVES, PETERSON, PETTUS & CONWAY,
Of Counsel for Petitioners.

CERTIFICATE UNDER RULE 58 (2)

I, Al G. Rives, attorney of record for the Petitioners, do hereby certify that the above and foregoing petition for rehearing is presented in good faith and not for delay and that the same is restricted to the ground that circumstances have intervened which are of substantial and controlling effect.

.....

AL G. RIVES,
Attorney for Petitioners.

CERTIFICATE AS TO SERVICE

I hereby certify that I have mailed a copy of the foregoing Petition for Writ of Certiorari properly addressed, to each of the following: Honorable James A. Simpson and Honorable Henry E. Simpson, Exchange Security Building, Birmingham, Alabama; and Honorable H. G. Breetz and Honorable M. D. Jones, L & N Office Building, 908 West Broadway, Louisville 1, Kentucky, all counsel of record for the respondent, by depositing the same in a United States Post Office or mail box, with first class postage prepaid.

This the ..... day of December, 1964.

.....

AL G. RIVES,
Attorney for Petitioners.